



## STATE OF CONNECTICUT OFFICE OF STATE ETHICS

### Draft Advisory Opinion No. 2014-5

May 15, 2014

**Question Presented:** The petitioner asks whether the “Ethics Enforcement Officer has the authority in the Evaluation process, wherein there has been a determination by the Ethics Enforcement Officer of a lack of probable cause, to conclude in a dismissal letter that the employee likely violated the Ethics Code.”

**Brief Answer:** We conclude that the Ethics Enforcement Officer does *not* have the authority to do so.

At its March 2014 regular meeting, the Citizen’s Ethics Advisory Board (“Board”) granted the petition for an advisory opinion submitted by Ernest F. Teitell, Esq., of Silver Golub & Teitell LLP. The Board now issues this advisory opinion in accordance with General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials<sup>1</sup> (“Ethics Code”).

### **Facts**

The following facts, as set forth by the petitioner, are relevant to this opinion:

On behalf of an unnamed State Employee, we are seeking an opinion from the . . . Board as to whether the State Ethics Enforcement Officer has the authority in the Evaluation process, wherein there has been a

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<sup>1</sup>Chapter 10, part I, of the General Statutes.

determination by the Ethics Enforcement Officer of a lack of probable cause, to conclude in a dismissal letter that the employee likely violated the Ethics Code.

We ask the [B]oard to consider the following factual scenario for purposes of rendering this opinion: The Office of State Ethics conducted an evaluation pursuant to section 1-92-24 of the regulations to determine whether and to what extent there is probable cause to believe that a State employee violated the Code of Ethics. After this preliminary evaluation, which did not include an interview with said State employee, the Ethics Enforcement Officer (“EEO”) determined that it would be difficult to show probable cause; the EEO then dismissed the case and closed the file. An official dismissal letter was sent to the employee—a copy of which was then placed in the employee’s file at the Office of State Ethics. This letter includes the EEO’s conclusion that the employee likely committed the violation.

### Analysis

The Office of State Ethics is a statutorily created state agency<sup>2</sup> and, as such,

is a body of limited authority that can act only pursuant to specific statutory grants of power. . . . It is well established that an administrative agency possesses no inherent power. Its authority is found in a legislative grant, *beyond the terms and necessary implications of which it cannot lawfully function*. . . . In the absence of a grant of authority from the legislature, any action taken by an agency is void.<sup>3</sup>

The issue before us, then, is this: Does the Ethics Code (or its regulations), expressly or by necessary implication, authorize the EEO to state that the subject of an evaluation likely violated one of its provisions, in a letter notifying the subject that the evaluation

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<sup>2</sup>See General Statutes § 1-80 (a).

<sup>3</sup>(Citations omitted; emphasis added; internal quotation marks omitted.) *Pereira v. State Board of Education*, 304 Conn. 1, 40-41 (2012).

was terminated for lack of probable cause (hereinafter, “termination-of-evaluation letter”)? In answering this question of statutory and regulatory construction, we are “guided by well established principles regarding legislative intent.”<sup>4</sup>

We begin with some necessary background as to the Ethics Code’s enforcement scheme, which distinguishes between “evaluations” and “preliminary investigations,” the former occurring before a complaint is filed, the latter, after.

With respect to “evaluations,” General Statutes § 1-82 (a) (1) provides that the EEO may “[undertake] an evaluation of a possible violation of this part . . . *prior to the filing of a complaint.*”<sup>5</sup> It may “begin at any time that the enforcement division has reasonable suspicion that a violation of the Ethics Codes has occurred,”<sup>6</sup> and during the course of it, the EEO (or his or her designee) may “collect information and evidence from the potential respondent(s) and other potential witnesses.”<sup>7</sup> Once the EEO (or his or her designee) “contact[s] . . . a third party concerning the matter,” the “subject of the evaluation shall be notified not later than five business days [thereafter] . . . .”<sup>8</sup> The EEO “may terminate any evaluation upon his or her determination that there is not probable cause to believe that a violation . . . has occurred.”<sup>9</sup>

“Preliminary investigations,” on the other hand, are set in motion by a complaint, and once a complaint is received or issued by the EEO, § 1-82 (a) (1) mandates that he or she “investigate any alleged violation of this part . . . .” That is, the EEO shall “conduct a preliminary investigation of the violation(s) alleged in the complaint

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<sup>4</sup>*Ethics Commission v. Freedom of Information Commission*, 302 Conn. 1, 8 (2011), citing *Hartford/Windsor Healthcare Properties, LLC v. Hartford*, 298 Conn. 191, 197-98 (2010) (explaining plain meaning rule under General Statutes § 1-2z and setting forth process for ascertaining legislative intent); see also *Alexandre v. Comm’r of Revenue Servs.*, 300 Conn. 566, 578 (2011) (“[a]dministrative regulations have the full force and effect of statutory law and are interpreted using the same process as statutory construction, namely, under the well established principles of . . . § 1-2z” [internal quotation marks omitted]).

<sup>5</sup>(Emphasis added.)

<sup>6</sup>Regs., Conn. State Agencies § 1-92-24 (a).

<sup>7</sup>Regs., Conn. State Agencies § 1-92-24 (b).

<sup>8</sup>General Statutes § 1-82 (a) (1).

<sup>9</sup>Regs., Conn. State Agencies § 1-92-24 (d).

and, if necessary, of any other related violations of the Ethics Codes that are alleged or discovered . . . .”<sup>10</sup> Within five days of receiving or issuing a complaint, the EEO must give notice, and a copy, of the complaint “to any respondent against whom such complaint is filed and shall provide notice of the receipt of such complaint to the complainant.”<sup>11</sup> The enforcement division may terminate a preliminary investigation if it determines either that “probable cause is not likely to be found on the facts available” or that it is not in the “State’s best interests to proceed . . . .”<sup>12</sup>

With this background in mind, we turn to the provisions most pertinent here—General Statutes § 1-82a (c) and § 1-92-24 (d) of the Regulations of Connecticut State Agencies—to determine whether either one, expressly or by necessary implication, authorizes the EEO to state, in a termination-of-evaluation letter, that the subject of the evaluation likely violated the Ethics Code.

Beginning with § 1-82a, it is titled “Confidentiality of complaints, evaluations of possible violations and investigations. Publication of findings.” Most relevant here is subsection (c) of § 1-82a, but to provide it with some context, we quote the relevant portions of the first three subsections:

(a) . . . An *evaluation* of a possible violation of this part . . . prior to the filing of a complaint shall be confidential except upon the request of the subject of the evaluation. . . .

(b) An investigation conducted prior to a probable cause finding [i.e., a *preliminary investigation*<sup>13</sup>] shall be confidential except upon the request of the respondent. If the investigation is confidential, the allegations in the complaint and any information supplied to or received from the Office of State Ethics

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<sup>10</sup>Regs., Conn. State Agencies § 1-92-24b (a).

<sup>11</sup>General Statutes § 1-82 (a) (1).

<sup>12</sup>Regs., Conn. State Agencies § 1-92-24b (f).

<sup>13</sup>It is clear that, in subsection (b) of § 1-82a, the words “investigation conducted prior to a probable cause finding” refer solely to a preliminary investigation (and not to an evaluation), given that the subsection assumes the existence of a complaint, a complainant, and a respondent, none of which are present in an evaluation, which, as noted above, is conducted “prior to the filing of a complaint.” General Statutes § 1-82 (a).

shall not be disclosed during the investigation to any third party by a complainant, respondent, witness, designated party, or board or staff member of the Office of State Ethics.

(c) Not later than three business days after the termination of *the investigation*, the Office of State Ethics shall inform the complainant and the respondent of its finding and provide them a *summary of its reasons for making that finding*. . . .<sup>14</sup>

The question is whether subsection (c) applies when the EEO terminates an evaluation, thus authorizing him or her to provide a “summary of . . . reasons for making [his or her] finding.” We conclude that it does not, and do so for three reasons.

First, subsection (c) uses the word “investigation,” not the word “evaluation,” even though that word appears just two subsections away, in subsection (a). And subsection (c) speaks not just of any “investigation,” but of “*the investigation*.” “[I]t is a rule of law well established that the definite article ‘the’ particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of ‘a’ or ‘an.’”<sup>15</sup> Thus, the use of the words “the investigation” instead of “an investigation” suggests that the word “investigation” was meant to refer back to something.<sup>16</sup> And what it logically refers back to is the following language in subsection (b): “An investigation conducted prior to a probable cause finding”—namely, a preliminary investigation.

Second, subsection (c) speaks of a “complainant” and a “respondent,” not of a “subject of the evaluation.” That is, subsection (c) requires the Office of State Ethics, upon terminating an investigation, to “inform *the complainant and the respondent* of its finding . . . .”<sup>17</sup> The problem is, there is neither a complainant

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<sup>14</sup>(Emphasis added.)

<sup>15</sup>(Internal quotation marks omitted.) *Am. Bus Ass’n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000).

<sup>16</sup>See *Am. Calcar, Inc. v. Am. Honda Motor Co., Inc.*, 651 F.3d 1318, 1342 (Fed. Cir. 2011) (“the word ‘the’ in the phrase ‘prompting . . . to select the option’ . . . simply refers back to the prior phrase ‘an option . . . is provided’”).

<sup>17</sup>(Emphasis added.) General Statutes § 1-82a (c).

nor a respondent in the context of an evaluation, which, as noted above, is conducted “prior to the filing of a complaint.”<sup>18</sup> Instead, during the evaluation phase, there is only what the Ethics Code and its regulations refer to as the “subject of the evaluation,”<sup>19</sup> a term that appears nowhere in subsection (c), but shows up only two subsections away, in subsection (a).

Third, the language in subsection (c) has been adopted practically verbatim in the section of the regulations dealing—not with evaluations—but rather with preliminary investigations. Specifically, in § 1-92-24b (titled “Preliminary Investigations”), subsection (f) provides, in part: “Not later than three business days after termination of the preliminary investigation the Office of State Ethics will notify the complainant and the respondent of its finding and provide them a summary of its reasons for making that finding.” But not only that, the section of the regulations dealing with and titled “Evaluations” has its own subsection—the soon-to-be-discussed subsection (d) of § 1-92-24—that addresses the steps the EEO must take when he or she terminates an evaluation.

Having concluded, for those three reasons, that § 1-82a (c) does not apply when the EEO terminates an evaluation,<sup>20</sup> we turn to the just-mentioned subsection (d) of § 1-92-24 to see whether it, expressly or by necessary implication, authorizes the EEO to state, in a termination-of-evaluation letter, that the subject likely violated the Ethics Code. Subsection (d) reads as follows:

The [EEO] *may terminate any evaluation upon his or her determination that there is not probable cause to believe that a violation of the Ethics Codes has occurred. If, prior to such determination, a notice of evaluation has been given to the subject of the evaluation . . . the [EEO] shall, upon his or her*

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<sup>18</sup>General Statutes § 1-82 (a) (1).

<sup>19</sup>General Statutes §§ 1-82 (a) (1) and 1-82a (a); Regs., Conn. State Agencies § 1-92-24 (c) and (d).

<sup>20</sup>It is clear nevertheless that § 1-82a (c) applies when the EEO terminates a preliminary investigation, thus authorizing him or her to provide a “summary of . . . reasons for making [his or her] finding.” This language, we believe, if not expressly then certainly by necessary implication, authorizes the EEO, upon terminating a preliminary investigation, to make the statement at issue in a letter informing the respondent and complainant of his or her finding.

*determination of no probable cause, notify the subject that the evaluation has been terminated.*<sup>21</sup>

In view of that language, subsection (d) cannot be read as expressly authorizing the EEO to make the statement at issue in a termination-of-evaluation letter. This becomes particularly apparent when its language is compared to that pertaining to preliminary investigations. As noted above, once the EEO terminates a preliminary investigation, the regulations require that he or she do two things: “[1] notify the complainant and the respondent of its finding *and* [2] provide them a *summary of its reasons* for making that finding.”<sup>22</sup> Subsection (d) contains similar notification language—the EEO “shall . . . *notify* the subject that the evaluation has been terminated”<sup>23</sup>—but it stops there, saying nothing about the EEO providing the subject with a “summary of reasons” for terminating the evaluation (or anything else, for that matter). That it contains no such language “is significant to show that a different intention existed.”<sup>24</sup>

Nor can subsection (d) be read as authorizing, by necessary implication, the EEO to make the statement at issue. A “necessary implication,” noted one court,

is more restrictive than mere ‘implication;’ it . . . implies that no other interpretation is permitted by the words of the instrument construed; and so it has been defined as meaning an implication which results from so strong a probability of intention that an intention contrary to that imputed cannot be supposed; that which leaves no room to doubt . . . .<sup>25</sup>

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<sup>21</sup>(Emphasis added.) Regs., Conn. State Agencies § 1-92-24 (d).

<sup>22</sup>Regs., Conn. State Agencies § 1-92-24b (f).

<sup>23</sup>(Emphasis added.) Regs., Conn. State Agencies § 1-92-24 (d).

<sup>24</sup>See *Saunders v. Firtel*, 293 Conn. 515, 527 (2009) (“when a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed” [internal quotation marks omitted]).

<sup>25</sup>*Strong v. Bostick*, 420 So. 2d 1356 (Miss. 1982), quoting 42 C.J.S. Implication at 405 (1944); see also *Envirotest Systems Corp. v. Commissioner of Motor Vehicles*, 293 Conn. 382, 391 n.5 (2009) (noting that Black’s Law Dictionary defines “necessary implication” as “[a]n



The language in subsection (d) does not just leave doubt as to whether it was intended to authorize the statement at issue; if anything, it implies just the opposite. That is, unlike a preliminary investigation, which the EEO may terminate for two reasons (i.e., “probable cause is not likely to be found on the facts available” or it is not in the “State’s best interests to proceed”<sup>26</sup>), an evaluation may be terminated for just one: the EEO’s “determination that there is *not probable cause* [i.e., not a “reasonable ground”<sup>27</sup>] to believe that a violation of the Ethics Codes has occurred.”<sup>28</sup> That said, the EEO’s statement that the subject of an evaluation *likely* violated the Ethics Code directly contradicts the sole ground for terminating an evaluation, namely, the EEO’s determination of *no* probable cause (or reasonable ground) to believe that the subject violated the Ethics Code. Hence, it certainly cannot be said that the language in subsection (d) carries a necessary (i.e., “leav[ing] no room to doubt”) implication authorizing the EEO to make that statement.

We conclude therefore that, with respect to subsection (d) of § 1-92-24, the authority to make the statement at issue in a termination-of-evaluation letter was not given expressly to the EEO, nor was it given by necessary implication.

### **Conclusion**

Having concluded that subsection (c) of § 1-82a does not apply in the context of an evaluation, and that subsection (d) of § 1-92-24 does not expressly or impliedly authorize the EEO to state, in a termination-of-evaluation letter, that the subject likely violated the Ethics Code, it is the opinion of the Board that it would be in excess of the EEO’s authority to do so.

By order of the Board,

Dated \_\_\_\_\_

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Chairperson

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implication so strong in its probability that anything to the contrary would be unreasonable” [internal quotation marks omitted]).

<sup>26</sup>Regs., Conn. State Agencies § 1-92-24b (f).

<sup>27</sup>Black’s Law Dictionary (8th ed. 2004).

<sup>28</sup>Regs., Conn. State Agencies § 1-92-24 (d).